

October 8, 2015

**VIA ECFS**

Chairman Tom Wheeler  
Commissioner Mignon Clyburn  
Commissioner Jessica Rosenworcel  
Commissioner Ajit Pai  
Commissioner Michael O’Rielly  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: *Implementation of Section 103 of the STELA Reauthorization Act of 2015, MB Docket No. 15-216, Amendment of the Commission’s Rules Related to Retransmission Consent, MB Docket No. 10-71***

Chairman Wheeler, Commissioner Clyburn, Commissioner Rosenworcel, Commissioner Pai, and Commissioner O’Rielly:

The Commission’s network non-duplication and syndicated exclusivity rules (“exclusivity rules”) are no longer necessary to enforce contractual exclusivity agreements between broadcasters and program suppliers. In an effort to “ensure a more competitive video marketplace for American consumers,” the undersigned organizations urge the Commission to adopt the Order the Chairman circulated in August that would eliminate these exclusivity rules.<sup>1</sup> Changes in the video marketplace and to the Commission’s rules since the exclusivity rules were adopted have undercut the basis for these protections, and it is time for the Commission to “take its thumb off the scales” of free market negotiations between broadcasters and multichannel video programming distributors (“MVPDs”).<sup>2</sup>

The exclusivity rules were first enacted before cable providers were required to obtain copyright clearance for the broadcast programming they retransmitted and before they were required to obtain consent of the broadcaster for use of its signal. Given legal and marketplace changes, the rules are at best redundant, since they only allow for FCC enforcement of contractual rights. Stated another way, the FCC’s program exclusivity rules do not themselves confer exclusivity on broadcast stations. Rather, they merely serve as an additional (and unnecessary) means of enforcing contractual exclusivity agreements between broadcasters and

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<sup>1</sup> FCC Chairman Tom Wheeler, *Upgrading Media Rules to Better Serve Consumers in Today’s Video Marketplace*, OFFICIAL FCC BLOG (Aug. 12, 2015, 11:54 AM), [www.fcc.gov/blog/upgrading-media-rules-better-serve-consumers-today-s-video-marketplace](http://www.fcc.gov/blog/upgrading-media-rules-better-serve-consumers-today-s-video-marketplace).

<sup>2</sup> *Id.*

program suppliers – a right it appears that few, if any, broadcasters have exercised as evidenced by the dearth of complaints filed at the Commission. In reality, the rules likely distort the marketplace. By giving regulatory special treatment to some kinds of contractual arrangements between programmers, networks, and local stations, the rules can encourage players to continue entering into these arrangements instead of exploring new ways to deliver programming to viewers.

The primary reason that the exclusivity rules are no longer necessary is that affiliation agreements between broadcast stations and networks and retransmission consent agreements between local stations and MVPDs can and do limit the ability of MVPDs to import distant signals. These contracts typically provide more expansive protection than the exclusivity rules, which apply only within narrow geographic zones. The Commission would be better served allowing a station's exclusivity protections to continue to be governed by private contractual relationships rather than perpetuating overlapping regulations designed for the same purpose.

Given the current contractual limitations of the parties, repealing the rules may not lead to any immediate changes in the marketplace. However, the undersigned organizations foresee several consumer benefits that will ultimately serve the public interest.

First, eliminating the exclusivity rules would give MVPDs a tool to keep broadcasters at the negotiating table and ensure that consumers have a competitive choice in MVPDs and are not harmed by the loss of local programming via blackouts. The Commission's commitment to localism is equally important to MVPDs, many of which are also community-based and all of whom desire to enhance their customer's video offering by providing access to local programming. MVPDs have a vested interest in carrying the stations that their subscribers want to watch and are at risk of losing subscribers as a result of signal blackouts when broadcasters walk away from retransmission consent negotiations. If these negotiations fail, broadcasters can rely on other competitors in the market to carry their signal; however, a blackout can have a devastating impact on MVPDs of all sizes, but particularly smaller and new entrant MVPDs that, unlike incumbent and larger providers, are unable to meet the rate demands of local stations. This is of even greater concern from a consumer perspective in the most rural markets where some consumers cannot receive an over-the-air broadcast signal.

Although it is likely that affiliation agreements between broadcast stations and networks will limit the ability of MVPDs to import distant signals in every situation, the elimination of the exclusivity rules may present the opportunity for video distributors to level the content market playing field and import a distant signal when it would benefit consumers, such as during an impasse in retransmission consent negotiations. Generally, out-of-market signals are only carried in the limited instances where subscriber demand justifies the cost of obtaining retransmission consent and paying much higher copyright fees associated with distant signal carriage. Indeed, carriage of distant signals has been in decline because such fees have become increasingly cost prohibitive. However, this option will ensure consumers will be able to receive

“must have” programming and provide MVPDs with a solution during impasses in retransmission negotiations that will temporarily appease their customers.

Furthermore, in those limited cases where legal and marketplace conditions allow MVPDs to negotiate for carriage of an out-of-market signal, it is likely to further the Commission’s localism goals. The Commission has consistently found that greater competition among broadcasters promotes localism by providing “added incentives to respond to conditions in local markets.”<sup>3</sup> Thus, the exclusivity rules undermine the Commission’s interest in promoting localism by blocking competition from out-of-market stations that would enhance the quality of local broadcast programming. Additionally, as indicated above, to the extent the local broadcaster offers local news, public affairs, and other compelling community interest programming desired by consumers, it would put pressure on the MVPD to negotiate for carriage of the local station as opposed to an out-of-market station. Viewers tend to prefer their local stations over out-of-market stations affiliated with the same network.

Second, repealing the exclusivity rules will have a positive long-term impact on broadband deployment and competition. Competitive wireline providers must offer broadband and linear video services in order to be competitive in the residential broadband marketplace. The Commission has long recognized that residential consumers continue to prefer to purchase both broadband and linear video services together in a bundled product.<sup>4</sup> New entrants have entered a retail MVPD marketplace in which consumers expect and demand the ability to purchase video service alongside broadband Internet access service. Yet local broadcasters remain the only source for the local broadcast programming that consumers demand as part of their MVPD subscription. In this market, the exclusivity rules have shifted bargaining power to broadcasters who use their sole supplier bargaining leverage to demand exorbitant retransmission consent fees in a “take it or leave it” approach to negotiations. As a result, many MVPDs, particularly smaller and new entrant providers, sell video services at a loss while maintaining the complementary voice and data service subscriptions that utilize other investments in their network. These perpetually rising costs for consumer-demanded programming impacts the ability of smaller and new entrant MVPDs to provide faster broadband and deploy or upgrade other competitive networks.

Given the changes to the video marketplace, it is clear that the exclusivity rules have outlived their intended purpose. As the Chairman recently pointed out, the exclusivity proposal

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<sup>3</sup> 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order on Reconsideration, 23 FCC Rcd 2010, ¶ 97 (2008); *see also id.* at ¶ 101 (concluding that “competition, and not concentration of market players, leads to better programming”).

<sup>4</sup> *See, e.g.*, Federal Communications Commission, Connection America: The National Broadband Plan at 38 (“*National Broadband Plan*”), available at: <http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>.

is analogous to the situation presented in the Sports Blackout Order, where the Commission unanimously agreed that the protection afforded by those rules was better left to the marketplace, not federal regulation.

The Commission has been inundated by interested parties who have taken the time to make their views known to Commission leadership and staff since the proposed Order was circulated in August. Based on the numerous materials and *ex parte* notices that have been filed, a complete, robust and actionable record has been developed in this proceeding. The record is ripe for action. We urge the Commission to vote on this item without further delay. By adopting the Order on exclusivity rules expeditiously, the Commission can start the process of updating its video rules and policies in a way that is representative of the current competitive MVPD marketplace.

Respectfully submitted,

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